

RICHARD L. SHAW
Claimant

VS.

CITY OF WINFIELD
Respondent

AND

SELF INSURED
Insurance Carrier

The stipulations of the parties are the same as specifically set forth in the Award of the Administrative Law Judge, with the additional stipulation entered into at oral

argument that timely written claim was made. The parties further agree and stipulate that the number of weeks of permanent partial disability compensation available for binaural hearing loss is one-hundred ten (110) weeks rather than the four-hundred fifteen (415) weeks used by the Administrative Law Judge in calculating her Award.

ISSUES

- (1) Whether the claimant met with personal injury by accident arising out of and in the course of his employment.
- (2) Nature and extent of the resulting disability, if any.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds that the facts relevant to a determination of the issues in this case are as set forth in the Award of the Administrative Law Judge and need not be repeated here. The Appeals Board, for purposes of its decision, adopts the findings of fact made by the Administrative Law Judge as set out in her Award of December 13, 1993. Suffice it to say that claimant is employed as a police officer for the respondent, City of Winfield's Police Department, and has been so employed for almost twenty years. During the course of that employment, he has been exposed to loud noises from police and other emergency vehicle sirens and from firearms, the latter exposure being particularly heavy due to his extended service as instructor at the police firing range.

The primary issue to be resolved in this claim is whether the exposure to noise from gunfire and sirens caused or contributed to claimant's hearing loss. The Appeals Board finds that it did not. In so finding, the Appeals Board is persuaded by the expert medical testimony of William S. Carter, M.D., a board certified otolaryngologist, whom the Appeals Board finds to be the most credible witness on the subject of causation. Dr. Carter, unlike claimant's expert, had the benefit of a complete medical history, including audiograms dating back to 1965, for purposes of comparison. Although claimant's expert, Dr. Kubina, opined that claimant's hearing loss was the result of noise exposure, he did not explain the absence of the typical audiometric curve or "notch" effect found in audiograms where hearing loss is the result of noise. Dr. Carter candidly admitted that as time passes and hearing loss progresses, the notch will sometimes be wiped out on an audiogram so that all you will see is a high-tone loss. However, in this case he had the benefit of a series of audiograms having been performed on claimant dating back to 1965. Even in those relatively early audiograms, there was never a hint of recovery at the 6,000 or 8,000 cycles per second range. This was significant to his conclusion that claimant does not have a noise-induced hearing loss as a noise-induced loss will show a very typical audiometric pattern with normal hearing in the low tones to mid tones, a loss of hearing usually in the 4,000 cycles per second range, but then a recovery in the higher range, particularly in the 6,000-8,000 cycles per second range. This loss with subsequent recovery is what is commonly referred to as a "notch" which will appear on the audiogram chart or graph.

It was the opinion of Dr. Carter that the most likely explanation for claimant's neurosensory hearing loss was a hereditary condition known as an autosomal dominant progressive neuro sensory hearing loss. He admitted that absent genetic testing this diagnosis could not be confirmed. Nevertheless, Dr. Carter was convinced that claimant's hearing loss was not noise induced. It is less significant to the Appeals Board that Dr.

Carter could not state unequivocally the cause of claimant's hearing loss. What is more significant is that he presented persuasive testimony that the cause was not occupational noise.

"Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case." Messenger v. Sage Drilling Co., 9 Kan. App. 2d 435, Syl. ¶ 3, 680 P.2d 556, *rev. denied* 235 Kan. 1042 (1984).

An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidence of the employment. Martin v. U.S.D. No. 233, 5 Kan. App. 2d 298, 615 P.2d 168 (1980); Hensley v. Carl Graham Glass, 226 Kan. 256, 597 P.2d 641 (1979).

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to weigh the evidence to determine the credibility of witnesses, to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant in making a determination as to disability. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, *rev. denied* 249 Kan. 778 (1991).

The Appeals Board finds that the claimant did not suffer personal injury by accident arising out of and in the course of his employment with the respondent.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated December 13, 1993, is hereby reversed to the extent that it finds a compensable injury.

Fees necessary to defray the expenses of administration of the Workers Compensation Act are hereby assessed against the respondent to be paid direct. These fees are as itemized and set forth in the December 13, 1993, Award of the Administrative Law Judge.

IT IS SO ORDERED.

Dated this ____ day of April, 1994.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: William A. Taylor, III, PO Box 631, Winfield, KS 67156-0731
David W. Andreas, Suite 303, State Bank Building, Winfield, KS 67156
Shannon S. Krysl, Administrative Law Judge
George Gomez, Director